United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7097
76-7129

To be argued by
JOSEPH D. AHEARN

United States Court of Appeals

FOR THE SECOND CIRCUIT

RAYMOND INTERNATIONAL, INC.,

Plaintiff-Appellee,

—against—

PETER KIEWIT-SLATTERY (JOINT VENTURE) sued herein as PETER KIEWIT SONS' COMPANY and SLATTERY ASSOCIATES, INC., d/b/a PETER KIEWIT SONS' COMPANY-SLATTERY ASSOCIATES, INC.,

Defendant-Appellant.

PETER KIEWIT-SLATTERY (JOINT VENTURE) sued herein as PETER KIEWIT SONS' COMPANY and SLATTERY ASSOCIATES, INC., d/b/a PETER KIEWIT SONS' COMPANY-SLATTERY ASSOCIATES, INC.,

Third-Party Plaintiff-Appellee,

—against—

BAYSHORE CONCRETE PRODUCTS COMPANY,

Third-Party Defendant-Appellant.

BRIEF OF PETER KIEWIT-SLATTERY (JOINT VENTURE) SUED HEREIN AS PETER KIEWIT SONS' COMPANY AND SLATTERY ASSOCIATES, INC., d/b/a PETER KIEWIT SONS' COMPANY-SLATTERY ASSOCIATES, INC., AS DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLEE

JAMES I. LYSAGHT
Attorney for Defendant-Appellant and Third-Party Plaintiff-Appellee
11 Park Place
New York, New York 10007
962-3050

JOSEPH D. AHEARN,
Of counsel.

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Introductory Statement

The instant brief is submitted on behalf of defendant and third-party plaintiff-appellee Peter Kiewit-Slattery

(Joint Venture) sued herein as Peter Kiewit Sons' Company and Slattery Associates, Inc., d/b/a Peter Kiewit Sons' Company-Slattery Associates, Inc. ("Kiewit") in reply to the brief of defendant and third-party defendant-appellant Bayshore Concrete Products Company ("Bayshore").

Preliminary Statement of Facts

The salient facts are contained in the painstaking opinion of Judge Motley (543-49).* The barge, Century, owned by plaintiff and moored at the construction site of the Cross Bay Bridge in Jamaica Bay, was engaged in lifting large pre-cast concrete beams from a scow moored alongside the Century. The beams were being placed on the bridge structure being erected by Kiewit.

The size and weight of the beams (also referred to as girders) are extremely important, especially as regards Kiewit's claim against Bayshore for extra expense in utilizing alternate means of handling the beams subsequent to the accident. The beams (called "T Beams") were made of pre-stressed, pre-cast concrete and weighed 130 tons and were 130 feet long (61, 165, 544, plaintiff's exhibit 2). The beams were 8 feet high and 8 feet wide on top (plaintiff's exhibit 2; Bayshore's answer to plaintiff's interrogatory 11).

Judge Motley's uncontradicted finding, substantiated by all the evidence, was that:

> "The girders were constructed with two steel cable loops *embedded in each end for the purpose of lifting*" (544) (emphasis added).

Approximately 200 girders had been lifted into position by use of these hooks prior to the accident.

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* Numerals in parentheses refer to pages in the joint appendix.

The Century was equipped with an "A" frame which held a 115 foot boom. Falls (or lifting wires) dropped from the boom and were attached to a lifting beam. The lifting beam had two arms, each with an inverted "U" clamp at the bottom, which clamped the lifting hooks as the girders were being raised. The lifting beam had an equalizer which balanced the weight of the girders during the raising. The hook-up of the girder and lifting beam was performed by Kiewit's crew. The Century was manned and operated by plaintiff under Kiewits' supervision. The beam involved in the accident (beam "T 205") had been manufactured by Bayshore in 1969. Bayshore delivered beam "T 205" to Kiewit two weeks prior to the accident in Cape Charles, Virginia and placed it on a flat deck scow under the supervision of Kiewit's agent, American Salvage Company. The scow was towed to New York and moored alongside the Century. The girders were secured in the scow by wooden blockings which held them in a "vise-like" manner. The blocks were nailed and clamped to the girders during the trip.

Judge Motley's opinion succinctly sets forth the manner in which the accident occurred:

> "Beam 'T 205' was being lifted in the manner described above. After the girder had been hooked up, a strain of 10 to 20 tons was taken by the fall of the Century. (Tr. 44-45, 151.) At this point the beam hookup was inspected by supervisors of Raymond and Kiewit. (Tr. 45, 59, 62, 151, 162.) The devices securing the girder on the scow were then released so that the girder was free and clear for lifting. (Tr. 45, 58-62, 65-71, 83-6, 151, 155, 158, 160-163, 166, 172-174, 192-194, 199, 200.) The beam had been raised to a height of several inches when the lifting loops on one end of the beam pulled out, causing the loops on the other end to break

and causing the beam to fall to the deck of the scow. (Tr. 45, 86, 162-164.)

"The strain of lifting the beam had caused the Century to list to a considerable degree. (Tr. 39-40, 46, 57, 144, 145, 163, 166.) As a result of the release of the weight caused by the beam falling, the barge rolled back to her other side. The steel lifting beam, which was still attached to the Century's falls swung inboard and struck the Century's stack and superstructure. (Pl. Exh. 3, 5, Tr. 46-47, 163-164)" (545-46).

The Issues at Trial and Bayshore's Contentions at Trial

Bayshore's contention before this Court, raised for the first time in the course of this lengthy litigation, is that the lifting hooks were not the subject of a "sale" between Bayshore and Kiewit because the contract between Bayshore and Kiewit did not include the lifting hooks, and, consequently, no warranties attached. Demonstrated *infra* is that Bayshore lacks standing to raise its contention for the first time in this Court (Point I); that the lifting hooks were, in fact, included within the contract of sale (Point II); and that, even assuming *arguendo* that there was no technical "sale" of the lifting hooks, Bayshore still gave all the warranties as if there had been a "sale" of the lifting hooks (Point III).

Judge Motley in her opinion correctly stated that there were two material questions of fact:

"The two significant factual issues in dispute are: 1) whether the wooden chocks had been removed before beam T 205 was lifted and 2) whether there was evidence of a structural defect in the loops

> which would cause them to break. The evidence adduced at trial indicates that the wooden blocks had been taken out before the beam was raised and that the accident was caused by a structural defect in the loops" (546).

At the beginning of the trial, each party presented its contentions to Judge Motley (2-24). This Court is respectfully referred to pages 19-24 wherein Bayshore's counsel gave Bayshore's contentions. Nowhere did Bayshore's counsel even remotely suggest that the lifting hooks were not sold to Kiewit. Bayshore argued that there was "no particular defect in these loops" (19). Bayshore claimed that "the lifting loops were more than adequate and had a large safety factor built into it. That the particular loops involved had the required ductibility and elasticity and was perfectly adequate for doing this job" (20). It was also contended by Bayshore that the apparatus (and particularly an equalizing device) used to lift the beams at Cape Charles was different than that used at the time of the accident (20-21). Bayshore also claimed that the wooden blocks which secured the beam during the voyage from Cape Charles had not been removed prior to the start of the lifting operation (21-22). Bayshore's counsel told Judge Motley that "any failure here was not due to any defect in manufacture which I haven't heard anything about, or any defect in the loops, but in the manner in which the mechanism and the manner in which this was being lifted" (22-23).

On the argument during the motions to dismiss at the close of plaintiff's case, Bayshore's counsel stated:

> "I respectfully submit that he may not have to show a particular defect. I would agree with that. He doesn't have to show a particular defect, but he must prove, and his burden of proof is to show a defect. That I say he has not done" (140).

Towards the end of the case, Bayshore's counsel stated:

> "So it certainly goes to the very heart of this case of whether this girder that failed had actually been freed prior to this attempted lift" (412).

See also pages 135-36, 283-84 and 410-12.

One searches the record in vain for the slightest intimation by Bayshore prior to this appeal that it ever claimed that the lifting loops were not sold to Kiewit.

Judge Motley's findings that 1) the blocks had been removed prior to commencement of the lifting operation; and 2) the loops broke as a result of improper weaving of the wires which was, perhaps, aggravated by rusting.

Whelan, plaintiff's mate on the Century (30) who was on the scow at the time of the accident (48-49), was emphatic that the blocks had been removed (44-46, 58-60, 62). Comer, Kiewit's project superintendent (142) who was also on the scow (160), was equally insistent that the blocks had been removed (160-63). A most pressing cross-examination by Bayshore of both Whelan (62-89) and Comer (188-203) failed in any manner to affect the unequivocal nature of their testimony.

Judge Motley, finding that Whelan's and Comer's testimony was credible and not convincingly refuted, found that the blocks had been removed prior to the lifting (546-47).

With respect to the structural defects in the lifting loops, Judge Motley held:

> "The loops apparently broke as a result of improper weaving of the wires which was, perhaps, aggravated by rusting" (548).

Judge Motley further held:

> "All parties agree that the lifting hooks which failed were coated with at least superficial rust. (Tr. 178, 179, 351-352). Mr. Silkiss testified that this rusting was *merely* superficial and did not cause significant weakening of the wires. (Tr. 351-352.) Defendant Kiewit submitted testimony that after the accident substantial rust had been found on the wires beneath the concrete surface of the girder. Neither Raymond nor Kiewit allege that rusting was the primary cause of the rupture. Their position, and the court agrees, is that the lifts broke due to improper design, possibly aggravated by the rusting" (549) (emphasis by Judge Motley).

After the accident, Whelan found rust on the loop down into the concrete (47-48). Comer, about two or three hours after the accident, dug down about 1½ inches with cold chisels and ball peen hammers in the four areas where the wires were broken (168-69). He "found a rusty condition on the pre-stressed wires" (169).

The touchstone of Bayshore's case was its expert witness, Silkiss, who was not listed in any pretrial memoranda as a witness (358). Silkiss testified that he received the lifting loops in question in August 1970 for purposes of testing (338). It was Silkiss' opinion that there were no secondary cracks; no significant corrosion; and no unusual breaks (351). Silkiss testified that "all the breaks showed characteristic deformation in ductibility indicating an overload of each wire as the wires broke" (351). According to Silkiss, the loops had "superficial" surface rust which, he said, was not significant from a stress standpoint (351-52). Silkiss' conclusion was "that the loops had been loaded to beyond their strength carrying capabilities" (353-54). He then detailed his reasons for such conclusion (354-57).

Kiewit's counsel had never been provided with a copy of Silkiss' report and had never even seen it (358). Kiewit's counsel reviewed the report during luncheon recess (359). On cross-examination, the following occurred:

> "Q. This exhibit I believe was handed to you, or delivered to you some time in August of 1970? A. Right.
>
> Q. Did you send a report to the insurance company soon thereafter? A. September 22.
>
> Q. Sir, the report that you have submitted here is dated, revised June 4, 1974; is that correct, sir? A. That's correct.
>
> Q. You revised this report only three days ago, Mr. Silkiss? A. Yes.
>
> Q. Do you have your unrevised report? A. Yes.
>
> Q. Who asked you to revise it, sir? A. Mr. Walsh.
>
> Mr. Lysaght: I have no further questions, your Honor.
>
> The Court: Who is Mr. Walsh?
>
> Mr. Geen: Mr. Walsh is an associate of Liberty Mutual Insurance Company.
>
> The Court: Well, I don't know what that is saying, Mr. Lysaght.
>
> What is that saying, that he has revised the report?
>
> Mr. Lysaght: I don't know, ma'am. It is dated June 4, 1974. Does the Court want to—may I have it marked for identification, your Honor?
>
> The Court: Do you have the unrevised report?
>
> Mr. Lysaght: Do we have it?
>
> The Witness: I have the page, the original page" (382-83).

Silkiss' "revision" of his report was the omission of the concluding paragraph of the report. The "revised"

report is found at p. 520 of the appendix and the "original" report appears at p. 515. The omitted concluding paragraph of the original report states:

> "The possible causes for overloading leading to failure—presupposing that only two loops were carrying the load because of the manner in which the lifting leg used on the job site (see sketch appended) could not easily uniformly distribute the load between adjacent loops—are lifting too rapidly and thereby imposing an indeterminate but additional dynamic load or, more probably, the 'homemade' design of three strands not woven together in a proper multi-stranded wire rope such that the load in the loops was not distributed uniformly or properly among the strands. Thus, any one of the three strands in a loop could be forced to carry more than its intended share of the load leading to its failure and ultimately failure of the other strands and loops" (515).

The following then occurred:

> "The Court: And that is the paragraph you were asked to revise?
>
> The Witness: Yes.
>
> The Court: In what manner was it revised?
>
> Mr. Lysaght: I didn't see the paragraph at all. I think it was left out.
>
> The Witness: The paragraph was left out.
>
> Mr. Lysaght: For the record, ma'am may we mark both of these as exhibits so your Honor can inspect them?
>
> The Court: Well, I don't know what is going on here. You are saying that was left out?
>
> Mr. Lysaght: Yes, ma'am.
>
> The Court: All right. Let it be marked" (386).

Thus, Judge Motley was entirely justified in finding:

> "Emannuel Silkiss, a metalurgical consulant called by Bayshore, testified to a study he had made for Bayshore on the loops after the accident. The significant portion of that report, which, the court later learned had been omitted and 'revised' by Bayshore for purposes of this trial, indicates that, in Silkiss' opinion, the wires in the loops had been improperly woven. He reported that the loops failed due to a '. . . "home-made" design of three strands not woven together in a proper multi-stranded wire rope such that the load on the loops was not distributed uniformly or properly among the strands. Thus, any one of the three strands in a loop could be forced to carry more than its intended share of the load leading to its failure and ultimately failure of the other stands and loops.'
>
> "(Report by Mr. Silkiss of Pitkin Associates, September 22, 1970.) (Tr. 384, 385, Exh. XXIV., Exh. M)" (548-49).

In addition, Freelund, who had a Bachelor's degree in Naval Architecture and Marine Engineering from Massachusetts Institute of Technology (92-93, 213) as well as extensive practical experience in the field (93-94, 212-14, 219-22), testified unequivocally in response to a comprehensive hypothetical question (214-17, 225-26) that the lifting loop fractured because the loop was unable to bear the stress that it was designed to bear (226-35).

POINT I

Bayshore's argument that the lifting loops were not included in the contract of sale between Bayshore and Kiewit was never made before Judge Motley or at any other time in this action, and, hence, Bayshore lacks standing to raise the point for the first time in this Court.

The contract between Kiewit and Bayshore provided:

> "It is agreed that the Seller will furnish all materials embedded into the prestressed items. Not included are such items as bearing pads, hearing assemblies and teflon materials" (503).

On p. 4 of its brief, Bayshore describes the lifting loops as "lifting loops or lifting pads." On p. 9 of its brief Bayshore states in italics that "*It [the contract] specifically excluded lifting pads.*" This is erroneous since the contract excluded not lifting pads, but bearing pads. Nevertheless, Bayshore then proceeds to argue that since the bearing pads [the lifting loops] were excluded from the contract, there was, although Bayshore furnished the lifting loops, no sale, no warranties, no breach of warranties and no liability upon Bayshore's part.

Bayshore's present argument is that the lifting loops were never "sold" by Bayshore to Kiewit and that, therefore, there were no warranties given by Bayshore. As shown *supra* at pp. 4-6, Bayshore never raised the point before Judge Motley. Bayshore never once in this action has raised the point. In fact, in the pre-trial order, it was Bayshore's contention that "it did not breach its contract with Peter Kiewit or any warranties expressed or implied" (26a). This constitutes a clear recognition upon Bayshore's part that the lifting loops were encompassed within the ambit of the contract and warranties. It was not

asserted by Bayshore that the lifting loops were outside the orbit of the contract of sale. To allege that there was no breach of the contract or the attendant warranties constitutes an explicit judicial admission that there was a valid underlying contract, with warranties, covering the sale of the instrumentality in question.

During trial, Bayshore's counsel stated:

> "*Mr. Fish [plaintiff's counsel] seems to say that since four loops broke, that means he would have a prima facie case of defective beam, defective loops.* I don't understand that at all. Here we have the testimony that 200 of these beams were lifted before, and now we have a beam being lifted and all four loops break, and Mr. Fish would have you say that there was no reasonable inference *or the most probable one is that those loops were defective.*
>
> "I submit that that is not fair inference, that it is equally probable that it was caused by the manner and method that it was handled from the time that it left Virginia *where title transferred to Kiewit, until the time of the occurrence, and that includes all the handling of it*" (130-31) (emphasis added).

It was later stated by Bayshore's counsel:

> "I don't know what Kiewit knew. I know they took over *the ownership and title* of this at Cape Charles and the unloading operation was their responsibility" (411-12) (emphasis added).

This Court has repeatedly held that if an argument is not properly raised below, it may not be raised for the first time in this Court.

Completely dispositive is this Court's decision in *Wilkerson* v. *Meskill,* 501 F.2d 297 (1974), where it was held:

> "Appellants, at this level for the first time, raise two arguments designed to circumvent the effect of the *Edelman* decision. First, it is argued that Connecticut has waived its immunity from suit; second, appellants contend that since pay received determines the amount of pension rights, portions of their suit seek valid future relief and that these portions should not have been dismissed. Since neither of these arguments was properly raised below, we cannot hear them now."

Directly in point also is this Court's decision in *Terkildsen* v. *Waters,* 481 F.2d 201 (1973). In *Terkildsen,* this Court, in an opinion by Judge Feinberg, stated:

> "Putting to one side the question whether defendants' 'right to offset' did not require some affirmative action on their part in view of the common law principle that mutual debts, even when arising out of the same transaction, do not cancel each other, we need not and should not consider defendants' argument. Defendants did not raise in the district court the propriety of pre-judgment interest for plaintiff, even though her complaint included a specific prayer for such interest and though her proposed findings of fact and conclusions of law requested 'interest as it may appear.' It is true that defendants' proposed findings took the position that a net judgment should be entered in their favor because plaintiff owed them more than they owed her, but the issue of pre-judgment interest for plaintiff was nowhere mentioned. Far more significantly, following the judge's opinion directing that pre-judgment interest be included in plaintiff's recovery, counsel for defendants sent Judge Bonsal a letter accompanying a proposed judgment, in which a method for computation of

> plaintiff's pre-judgment interest at six per cent was detailed. At no point in this letter, nor at anytime thereafter, did defendants challenge the award to plaintiff of pre-judgment interest on the ground that they had exercised their right to offset, though they might have done so even after judgment was entered by a motion under Fed.R.Civ.P. 59(e). Cf. *Gilroy* v. *Erie-Lackawanna R.R.*, 44 F.R.D. 3 (S.D. N.Y. 1968)" (481 F.2d at 204).

This Court in *Terkildsen* then held:

> "Under these circumstances, we see no reason to depart from the general rule of practice which forecloses appellate consideration of issues not raised below. See, e.g., *Hormel* v. *Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 85 L.Ed. 1037 (1941). Adherence to the rule is particularly apt where, as here, factual questions may have been implicated as to which the judge made no findings because the issue was not directly raised and equally, where considerations underlying a subtle legal issue could have been exposed and distilled by the able district judge so as to facilitate more informed consideration by this Court" (481 F.2d at 204-05).

In the instant case the contention raised by Bayshore is raised for the first time in this Court. At no time before Judge Motley and at no time since commencement of the litigation did Bayshore even suggest the contention it now urges in this Court as the basis for reversal of the judgment. Nor as stressed in *Terkildsen* did Bayshore (if it believed its position possessed merit) move under Rule 59(e) after judgment was entered.

Furthermore, as reasoned in *Terkildsen*, if the question now raised by Bayshore had been raised before Judge

Motley, the narrow argument advanced by Bayshore could have been resolved.

In *List* v. *Fashion Park, Inc.*, 340 F.2d 457, 461 (1965), cert. denied 382 U.S. 811, 86 S. Ct. 23, 15 L.Ed.2d 60, rehearing denied 382 U.S. 933, 86 S.Ct. 305, 15 L. Ed.2d 344, this Court held:

> "As for the allegation of misreprsentation, we decline to consider a claim not presented to the trial court which raises substantial issues of fact, requiring resolution, such as the ascertainment of the true value of plaintiff's shares on November 17, 1969."

To the same effect are this Court's decisions in *Patent & Licensing Corp.* v. *Olsen,* 188 F.2d 522, 525 (1951), and *Palmer* v. *Reconstruction Finance Corp.,* 164 F.2d 466, 468 (1947), cert. denied 334 U.S. 811, 68 S. Ct. 1016, 92 L. Ed. 1742.

The rule applied by this Court applies both to questions of fact or of law. Thus, it is not necessary to denominate Bayshore's argument as one of fact or of law, although the question of whether the lifting loops were liftings loops or were "bearing pads" was irrefutably a factual issue (*Mallad* v. *County Federal Savings and Loan Assn.,* 32 NY2d 285, 290 (1973); *Holgerson* v. *Swan Lake Poultry Co., Inc.,* 30 AD2d 591 (1968); *National Utility Service, Inc.* v. *Thatcher Glass Manufacturing Co., Inc.,* 30 AD2d 168 (1968)).

Bayshore's present argument constitutes nothing more than an appellate afterthought and an attempt to concoct some semblance of appellate argument.

POINT II

The lifting loops were "sold" by Bayshore to Kiewit. A lifting loop is not a "bearing pad".

The contract required Bayshore to "furnish all material embedded into the prestressed items" (503). The evidence was that the lifting hooks were embedded into the beams (149, 158). Judge Motley found that the hooks were "embedded in each end for the purpose of lifting" (544).

Bayshore's argument that the lifting hooks were really bearing pads is sham. The lifting device was referred to at trial as a lifting hook (50) or a lifting loop (61) or a lifting pad (235). Bayshore's own counsel referred to it either as a lifting loop (307-09, 338, 388-89) or a loop (339, 345, 351, 354-57, 391-92, 394). Silkiss, Bayshore's expert witness, referred to it as a loop (346, 349, 353-56, 361-63, 365, 369, 376-77, 394-95). The witness, Thibodeaux, a Bayshore witness who was employed by Bayshore Concrete Products, called the device a lifting loop (401). Bayshore's witness, Koppinger, an insurance investigator for Bayshore, called it a lifting loop (309). *No witness called the device a bearing pad. The term "bearing pad" does not appear once in the 492-page transcript.*

Bayshore's attempt to equate a "lifting hook" with a "bearing pad" is simply engaging in semantics. A pad is "a cushion-like mass of some soft material, as for comfort or protection or for filling out or stuffing" (The Living Webster's Encyclopedic Dictionary). The photograph of the lifting hooks, which appears in the record at p. 537, conclusively refutes Bayshore's assertion that the lifting hook was a "bearing pad."

The report of Silkiss, himself, proves conclusively that the device was not a "bearing pad." Silkiss' report states:

> "As received, the loops were U-shaped with an overall end-to-end length of 29 and 33 inches. Each loop was covered with a protective sheath approximately 22 inches long. Inside, the loop was composed of three strands, with each strand made up of seven wires.
>
> * * *
>
> "Individually, the loops consisted of three strands, two of which were nominally of 7/16-in. diameter—7 wire construction and one ½-in. diameter—7 wire construction. The strands were merely laid side by side to each other and did not comprise a standard rope construction." (517).

We respectfully submit that Bayshore's present contention that the lifting device was a "bearing pad" is totally untenable.

To support its argument that the lifting loops were not sold to Kiewit, Bayshore's brief (pp. 4-5, and also relied on at p. 9) sets forth colloquy between Judge Motley and Kiewit's counsel at pp. 118-19. First, Kiewit's counsel stated that the girders were ordered from Bayshore and that Bayshore had put the hooks in the girders. Secondly, Kiewit's counsel tentatively agreed with Judge Motley's statement that the "loops are generally a part of the beam itself so it could be lifted." This shows that the lifting loops were an integral part of the beam. It is impossible to fathom Bayshore's reliance on this colloquy as proving that there was no sale of the lifting loops.*

---

* Bayshore's present argument in this Court provides incontestable proof of the correctness of the rationale of this Court's decisions cited in Point I precluding a party from raising an argument for the first time in this Court. Judge Motley, if the point had been raised before her, could easily have resolved it.

POINT III

Even assuming *arguendo* that there was no "sale" of the lifting loops by Bayshore to Kiewit, there was a gratuitous bailment, and under this Court's decision in *Delaney* v. *Towmotor Corp.*, 339 F.2d 4 (1964), there was an implied warranty.

Bayshore (brief, p. 6) claims that "this is not a case where a manufacturer has put into the stream of commerce a mass produced article generally available to the public, such as an automobile or commonly used drug." Bayshore's second (and main) contention is that there was no "sale" and that the absence of a "sale" precludes the applicability of an implied warranty. Bayshore's arguments, which are novel, narrow and erroneous interpretations of the field of products liability, are fatally defective on their face and conclusively refuted by this Court's unanimous decision in *Dalaney* v. *Towmotor Corp.*, 339 F.2d 4 (1964). In *Delaney,* this Court affirmed a judgment based upon a theory of strict liability in favor of plaintiff, an employee of a prospective purchaser, against the manufacturer of a defective fork lift truck being used by plaintiff which had been sent to plaintiff's employer for demonstration purposes. In writing for this Court, Judge Friendly stated:

> "Although the accident occurred on a pier, the parties have properly assumed the case to be governed by the law of New York rather than by the general maritime law. *Fredericks* v. *American Export Lines, Inc.,* 227 F.2d 450, 454 (2 Cir. 1955), cert. denied, 350 U.S. 989, 76 S.Ct. 475, 100 L.Ed. 855 (1956); *Forkin* v. *Furness Withy & Co.,* 323 F.2d 638 (2 Cir. 1963). In view of the decision in *Goldberg* v. *Kollsman Instrument Corp.,* 12 N.Y. 2d 432, 436-437, 240 N.Y.S.2d 522, 594-595, 191

> N.E.2d 81 (1963), and of the approving citation there of *Greenman* v. *Yuba Power Prods., Inc.*, 59 Cal.2d 57, 27 Cal Rptr. 697, 377 P 2d 897 (1963), we entertain no doubt that the Court of Appeals would consider a hilo to be 'an article * * * of such a character that when used for the purpose for which it is made it is likely to be a source of danger to several or many people if not properly designed and fashioned,' and thus to be a proper subject for manufacturer's strict liability under New York law."

Bayshore's claim that warranties attach only to a mass produced article was also rejected by the rationale of this Court's decision in *Wheeler* v. *Standard Tool and Manufacturing Co.*, 497 F.2d 897 (1974).

Regarding Bayshore's main argument on the instant appeal (that the absence of a sale insulates it from liability for any implied warranty), the identical argument was made to this Court in *Delaney* where it was argued by defendant (brief of defendant-appellant in *Delaney*, p. 6) that "we do not deny that in a bailment for hire, the bailor warrants that the article he delivers is fit for intended use. *What we say is that this rule is not applicable to the instant case because the transaction here was no more than a gratuitous bailment*" (emphasis added). In *Delaney*, this Court squarely rejected defendant's argument, holding:

> "Towmotor's argument is rather that a manufacturer's liability is for breach of an implied warranty and that there can be no such warranty where as here, there has been no sale. The transaction between it and Hogan, says Towmotor, was a gratuitous bailment and the only duty of the bailor in such a case is to give 'warning or notice of those defects * * *, if any, of which it had knowledge and which in reasonable probability would imperil those

using' the subject of the bailment—a proposition for which it cites *Knapp* v. *Gould Auto. Co.*, 252 App. Div. 430, 433, 299 N.Y.S. 688, 691 (1937). It distinguishes *Covello* v. *State*, 17 Misc.2d 637, 187 N.Y.S.2d 396 (Ct.Cl. 1959), which was cited by the district Judge, as being a suit by a bailee under a bailment for hire.

"We find it unnecessary to decide whether New York would hold that a bailor who received no immediate consideration but hoped for ultimate sale would come within the principle narrowly limiting the implied warranties in the typical gratuitous bailment such as the loan of equipment to a friend—an issue that would be vital if Towmotor had sold the hilo to Moore, the loan was made by Moore, and the action was against it. For we deal here with manufacturer's liability and, as intimated in *George* v. *Douglas Aircraft Co.*, 332 F.2d 73, 79-80 (2 Cir.), cert. denied, 85 S.Ct. 193 (1964), we are convinced that New York is among those enlightened jurisdictions that no longer regard 'an obligation which the law imposes irrespective of the intention of the parties or even in direct contravention of their expressions as in the same category as a contractual warranty, express or fairly implied.' See Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1124-1134 (1960); Restatement (Second), Torts, § 402A, comment m (Tent. Draft No. 10, 1964). New York regards the liability of the manufacturer of an article as arising from '[h]aving invited and solicited the use,' *Randy Knitwear, Inc.* v. *American Cyanamid Co.*, 11 N.Y. 2d 5, 13, 226 N.Y. S.2d 363, 368, 181 N.E.2d 399, 403 (1962); Chief Judge Desmond has characterized 'strict tort lia-

> bility' as 'surely a more accurate phrase' to identify this new concept than breach of warranty. *Goldberg* v. *Kollsman Instrument Corp., supra,* 12 N.Y. 2d at 437, 240 N.Y.S.2d at 595, 191 N.E.2d 81."

In *Covello* v. *State of New York,* 17 Misc.2d 637, 642 (Court of Claims, 1959), cited by this Court in *Delaney,* the court held:

> "The implication of a warranty of fitness for use arises in cases of bailment as well as in sales. (*Matter of Casualty Co.* [*Blass Co. Claim*], 250 N.Y. 410, revg. 222 App. Div. 304.)"

In *Hoisting Engine Sales Co.* v. *Hart,* 237 N.Y. 30, 36 (1923), the New York Court of Appeals held:

> "That the sale of any of these things was in writing, expressing no warranty, would not prevent the warranty by implication from attaching. By analogy there is an implied warranty in the hiring or bailment of certain kinds of property."

In illustrations which are factually pertinent to the case at bar, the New York Court of Appeals in *Hoisting Engine* then stressed:

> "Shipowners agreeing to furnish the necessary cranes, chains and gearing to a stevedore to discharge a cargo impliedly warrant that the chains are so far sound as to be sufficient for the work intended. (*Mowbray* v. *Merryweather* [1895], 2 Q.B. 640.) Sacks to be used in unloading a cargo of peas are warranted by implication to be fit for the purpose. (*Vogan & Co.* v. *Oulton,* 81 L. T. Rep. 435)" (237 N.Y. at 36).

The New York of Appeals in *Hoisting Engine* quoted from Halsbury's Laws of England (Vol. 1, sec. 1117):

> "The owner of a chattel which he lets out for hire is under an obligation to ascertain that the chattel so let out by him is reasonably fit and suitable for the purpose for which it is expressly let out, or for which, *from its character,* he must be aware it is intended to be used: his delivery of it to the hirer amounts to an implied warranty that the chattel is in fact as fit and suitable for that purpose as reasonable care and skill can make it" (emphasis by court).

The principle enunciated in *Hoisting Engine* was reaffirmed in *Gambino* v. *John Lucas & Co., Inc.,* 263 App. Div. 1054 (1942):

> "The facts, not in dispute, required a holding, as matter of law, that the defendant John Lucas & Co., Inc., although it was not the manufacturer thereof, impliedly warranted that the machine which it leased to the plaintiff was reasonably safe and suitable for the use intended. (*Hoisting Engine Sales Co.* v. *Hart,* 237 N.Y. 30; *Hansen* v. *Adams Grease Gun Corp.,* 254 App. Div. 633; affd., 278 N.Y. 687.)"

In *Inverso* v. *Whitestone Transit Mix Corp.,* 30 AD2d 565 (1968), the court held:

> "In our opinion, plaintiff proved a *prima facie* case of liability against both defendants on several theories: (1) If the hoppers were in fact personal property, as plaintiff claims and as the testimony indicates, then, since the hoppers were leased as part of a ready-mix concrete plant, both defendants im-

> pliedly warranted that the hoppers were fit and suitable for the purpose intended (*Hoisting Engine Sales Co.* v. *Hart,* 237 N.Y. 30). The use by plaintiff's intestate of the hoppers was within the reasonable contemplation of defendants and, therefore, plaintiff was entitled to sue for breach of the implied warranty (*Goldberg* v. *Kollsman Instrument Corp.,* 12 NY 2d 432; *Thomas* v. *Leary,* 15 AD 2d 438)."

To the same effect are *Tully* v. *Empire Equipment Corp.,* 28 AD2d 935 (1967), and *Acc. Trucking* v. *McLean Trucking,* 53 Misc. 2d 321, 326 (Civil Court, N. Y. County, 1967).

It is incontrovertible that Bayshore knew the purpose for which the lifting hooks were to be put by Kiewit. The very beginning of the contract (plaintiff's exhibit 2) between Bayshore and Kiewit expressly provided that Bayshore was "to furnish all material set forth in 'Section 2' hereof necessary in the construction of Cross Bay Parking Bridge, CPR-3 for Triborough Bridge & Tunnel Authority."

It was stipulated on the record by Bayshore's counsel:

> "It [the lifting hook] was installed into the girders for the absolute necessity of Bayshore using them to lift the girders after manufacture and put them on the scale, *and I would admit that they were left there for use as far as the convenience of Kiewit is concerned*" (138-39) (emphasis added).

Thus, Bayshore knew that the lifting hooks were to be used by Kiewit to raise the 130-ton beams onto the bridge and, accordingly, Bayshore knew that there was present potential peril to person and property if the hooks were

defective. It was Bayshore's act of introducing the beams and hooks into the "stream of commerce" (*Delaney* v. *Towmotor Corp., supra,* 339 F.2d 4, 6 (2d Cir.)) which activated the warranties.

Aside from the above well-settled authorities, reason, itself, dictates that warranties attendant upon the commercial furnishing of a product be coterminous with those of a sale. The broadening scope of warranties is embedded in a public policy designed to protect person and property. In that light, the form of the transaction is of no moment. If a product is defective and has been introduced into the stream of commerce, the danger posed is no less merely because the transaction takes the form of a lease.

The very recent developments in New York law regarding products liability attest completely to the ever expanding liability of a manufacturer of a defective product. All these decisions bespeak a need to afford protection to the public. In *Codling* v. *Paglia,* 32 NY2d 330 (1973) the New York Court of Appeals, in enunciating the doctrine of strict products liability in New York, held that the manufacturer of a defective product could be held liable to an innocent bystander, without proof of negligence, for damages sustained in consequence of the defect. In *Velez* v. *Craine & Clark Lumber Corp.,* 33 NY2d 117 (1973), the New York Court of Appeals, in reaffirming the doctrine of strict products liability in *Codling,* voided the disclaimer and waiver of warranty printed on the manufacturer's invoice upon grounds of public policy. The New York Court of Appeals in *Bolm* v. *Triumph Corp.,* 33 NY2d 151 (1973), rejected the rule that the liability of a manufacturer does not extend to injuries sustained as a consequence of the "second collision." In *Victorson* v. *Bock Laundry Machine Co.,* 37 N.Y.2d 395 (1975), the New York Court of Appeals, in overruling *Mendel* v. *Pittsburgh Plate Glass Co.,* 25 NY2d 340 (1969), held that the

statute of limitations on a strict products liability cause of action arose, not on the date of sale, but on the date of injury. In April of this year, the New York Court of Appeals in *Micallef* v. *Miehle Co.*, —— NY2d —— (N.Y. L.J., April 12, 1976, at p. 1), in overruling the doctrine of *Campo* v. *Scofield,* 301 NY 468 (1950), held that the fact that the defect in the product was patent would not, per se, exculpate the manufacturer from liability. In fact, as between Bayshore and Kiewit, the fact that the lifting hook was sold directly from Bayshore to Kiewit (or, proceeding upon Bayshore's assumption, was the subject of a direct bailment between Bayshore and Kiewit) fortifies even more the liability of Bayshore to Kiewit. See *Simchick* v. *I. M. Young & Co.,* 47 AD2d 549 (1975), affd. 38 N.Y. 2d 921 (1976). No antiquated argument bottomed upon the form of the transaction may exempt a manufacturer of a defective product from liability. Having sold (or furnished) a defective product to Kiewit, Bayshore is fully liable for all the consequences flowing from the damage caused by that defective product.

POINT IV

Judge Motley was eminently correct in holding that as regards plaintiff's recovery against Kiewit, Bayshore was required to indemnify Kiewit both 1) under the indemnification provision of Bayshore's contract with Kiewit; and 2) because of Bayshore's breach of implied warranty of fitness for use.

Judge Motley held:

> "Bayshore must indemnify Kiewit for damages paid to plaintiff under both the contract and the implied warranty of fitness of use" (554).

a) As regards plaintiff's recovery against Kiewit, Bayshore is required to fully indemnify Kiewit under the contractual indemnification provision.

Bayshore (brief, p. 11) has seized on the clause "suits arising from any act of omission of the seller." Additionally, as the factual basis for its argument, Bayshore (brief, p. 12) blandly postulates that Bayshore was not negligent and that Kiewit was negligent. Bayshore's brief consists of convoluted reasoning. There is not one shred of evidence in this case indicating that Kiewit was guilty of any negligence whatsoever. Conversely, it was Bayshore, and Bayshore alone, who was guilty of negligence.

The full indemnification provision between Kiewit and Bayshore is found in Section 8 of the contract (plaintiff's exhibit 2) between said parties, and is set forth at p. 501 of the joint appendix.

Bayshore points to no page reference to substantiate its claim that Kiewit was negligent. There was no negligence to any extent upon Kiewit's part. However, even assuming *arguendo* that Kiewit could be deemed negligent (which we completely and strenuously deny), then, the indemnification agreement would still be operative despite any negligence on Kiewit's part. See *Kurek* v. *Port Chester Housing Authority,* 18 NY2d 450 (1966) and *Liff* v. *Consolidated Edison Company,* 23 N.Y.2d 854 (1969), which decisions culminated in the landmark decision of the New York Court of Appeals in *Levine* v. *Shell Oil Co.,* 28 N.Y.2d 205 (1971) in which the rule of *Thompson-Starrett* v. *Otis Elevator Co.,* 271 N.Y. 36 (1936) was overruled. Even assuming *arguendo* that Kiewit was negligent, the indemnification agreement between Kiewit and Bayshore would still afford complete indemnification to Kiewit (*Nicolosi* v. *Aberthau-Cowper,* 49 AD2d 670 (1975); *Allman* v. *Sigfield Construction Co.,* 49 AD2d 356, 360 (1975). There is no longer any need that an indemnifi-

cation clause contain express language referring to the nature of the indemnitee "but merely that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Margolin* v. *New York Life Insurance Co.*, 32 NY2d 149, 153 (1973)). See especially this Court's decision in *Warren* v. *Hudson Pulp & Paper Corp.*, 477 F.2d 229 (1973). If Bayshore "had reservations as to the scope of the agreement, [it] should have insisted on a different indemnification clause or refused to give [its] assent to the contract" (*Levine* v. *Shell Oil, supra,* 28 NY2d 205, 213 (1971)).

In the case at bar, Bayshore was guilty of negligence, and so the thrust of the agreement may not be avoided by any fatuous contention that Bayshore is not at fault. Subdivision (b) of the indemnification agreement states that it is operative upon "any act of omission" of Bayshore. There was an "act of omission" within the purview of the indemnification provision. Moreover, subdivision (d) provides that Bayshore "warrants and guarantees the materials covered by its agreement." It was the defective lifting hook sold by Bayshore to Kiewit which cast Kiewit in liability to plaintiff, with the result that Bayshore is required to indemnify Kiewit. Decisively, the last sentence of the indemnification provision provides that Bayshore shall indemnify Kiewit "against, and save them harmless from, any and all loss, damage, costs, expenses and attorney's fees suffered or incurred on account of any of the aforesaid matters." Particularly apposite here is *Grineff* v. *Ithaca College,* 49 AD2d 669 (1975):

> "Leaving aside the fact that this record contains no showing of the nature of the fault which caused the injuries for which plaintiff has been compensated, we give the word 'harmless' its broad, dic-

tionary meaning—'free from liability or loss—often used in the phrase to save harmless or to hold harmless' (Webster's Third New Int. Dictionary, p. 1034)."

b) Bayshore is also required to indemnify Kiewit because of Bayshore's breach of implied warranty of merchantability and fitness for use.

Not even considering the indemnification agreement, Bayshore is required to indemnify Kiewit for the entire amount Kiewit is obligated to pay plaintiff. Bayshore's obligation, independently of the contractual indemnification provision, stems from its breach of implied warranty of merchantability and fitness for use (*Goldberg* v. *Kollsman Corp.*, 12 NY2d 432 (1963); *Randy Knitwear* v. *American Cyanamid Co.*, 11 NY2d 5, 13 (1962); *Simchick* v. *I.M. Young & Co., supra,* 47 AD2d 549 (1975), affd. 38 N.Y.2d 921 (1976); *Peragine* v. *Esposito,* 17 Misc.2d 621 (Appellate Term, First Department, 1959), affd. 8 AD2d 710 (1959), reargument and leave to appeal denied 8 AD2d 806 (1959)).

POINT V

Judge Motley was also correct in granting judgment to Kiewit, on its claim as a plaintiff against Bayshore for the extra expense incurred by Kiewit in the alternate means of raising the beams which Kiewit was forced to utilize subsequent to the accident.

Judge Motley also properly granted judgment to Kiewit, on its claim as a plaintiff against Bayshore for the extra expense and the alternate means of raising the beams after the accident occurred (555-57). At the time of its exe-

cution of the contract with Kiewit, Bayshore knew that Kiewit had already contracted to construct the Cross Bay Parkway Bridge pursuant to a prior contract between Kiewit and the Triborough Bridge & Tunnel Authority (see page 1 of plaintiff's exhibit 2 at p. 499). The contract between Bayshore and Kiewit related solely to the construction of the bridge. Comer, Kiewit's project superintendent, about two or three hours after the accident dug into another beam and found that such beam, like the beam involved in the accident, contained rusty pre-stressed wires (168-70). As the result of the happening of the accident as well as the result of Comer's finding of the same rusty condition in another beam, Kiewit, during the conclusion of the bridge construction, terminated the procedure which had been used up to the time of the accident, and, instead, used a new method of raising the beams (which is detailed at pp. 170-71) and which resulted in an additional expense to Kiewit of the sum of $44,386.22.

As seen from Judge Motley's opinion (at p. 556), Bayshore claimed that the accident should have been viewed by Kiewit as a "fluke," not necessitating the use of diffent means of lifting the remaining girders. At the trial, Bayshore did not present the slightest evidence which would indicate in any manner that the means utilized by Kiewit after the accident were unreasonable or imprudent. Neither at the trial nor on the instant appeal does Bayshore challenge the sum of $44,386.22. It is Bayshore's argument (p. 13) that Bayshore was not at any time required to supply Kiewit with the lifting hooks; that the supplying of the lifting hooks prior to the accident was, in reality, a gift by Bayshore to Kiewit; and that far from incurring an additional expense by being forced to use the new alternate means of raising the girders, Kiewit was merely incurring an expense which it should have been incurring from the inception of the work. To say that Bay-

shore's argument is totally baseless would be to engage in a gross understatement. The lifting hooks were, as shown in Point II, *supra,* completely included within the contract of sale.

As Judge Motley found:

> "A near catastrophe having occurred, neither Kiewit nor Raymond could reasonably be expected to imperil the lives of their crew and personnel by lifting other beams in the same manner. Kiewit argues that the potential hazard inherent in using the lifting hooks constituted a special circumstance which mitigated against further use of the hooks as a method of raising the girders" (555-56).

Judge Motley then concluded:

> "The court agrees with Kiewit that given the evidence of rusting in the wires and the serious risks attendant to a similar accident, Kiewit acted reasonably in formulating another method for lifting the beams.
>
> "The fact of the accident and the discovery of the rust made another accident of the same sort foreseeable. Under these circumstances, should another similar accident have in fact occurred, Kiewit would likely have been held liable or at least been forced to bear its own losses under the broadly accepted rule that no recovery may be had for losses which the person injured might have prevented by reasonable efforts and expenditures. *Mayes Company* v. *State,* 18 N.Y. 2d 549, 554, 277 N.Y.S.2d 393 (1966).
>
> "The burden of proof on the need to minimize damages is on the party seeking to limit recovery. *Mayes, supra.* Bayshore has failed to offer any such proof.

> Accordingly, the court finds that the alternate means of lifting the beams was reasonable and the additional costs incurred by Kiewit in utilizing a different method are properly assessed against Bayshore as a foreseeable and reasonable expense flowing from Bayshore's breach of warranty and contract. *Long Island Lighting Co.* v. *City of Glen Cove,* 64 Misc.2d 768, 315 N.Y.S.2d 656 (1970)" (556-57).

Judge Motley's decision is in absolute accord with all authorities on the point. It must be emphasized that the measures taken by Kiewit immediately after the accident were designed solely to prevent any further danger to person or property. The accident in question involves only property damage; it was only by the most fortuitous circumstance that severe injuries or even death did not result from the defective lifting hook. Subdivision (2) of section 336 of the Restatement of Contracts provides:

> "Damages are recoverable for special losses incurred in a reasonable effort, whether successful or not, to avoid harm that the defendant had reason to foresee as a probable result of his breach when the contract was made."

It is stated in Corbin on Contracts (Section 1044):

> "Inasmuch as the law denies recovery for losses that can be avoided by reasonable effort and expense, justice requires that the risks incident to such effort should be carried by the party whose wrongful conduct makes them necessary. Therefore, special losses that a party incurs in a reasonable effort to avoid losses resulting from a breach are recoverable as damages."

In *Tampa Electric Co.* v. *Nashville Coal Co.,* 214 F. Supp. 647, 652 (D.C. Tenn. 1963), the court held:

> "The critical factor in determining fulfillment of a plaintiff's duty to mitigate is whether the method which he employed to avoid consequential injury was reasonable under the circumstances existing at the time. The rule with respect to the mitigation of damages may not be invoked by a contract breaker 'as a basis for hypercritical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter.' In re *Kellett Aircraft Corp.*, 186 F.2d 197, 198-199 (3d Cir., 1950). As stated in McCormick, Damages, Sec. 35 (1935), 'a wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him'."

See also *Depew* v. *Peck Hardware Co.*, 121 App. Div. 28 (1907), affd. 197 N.Y. 528 (1909); *Putnam Lumber Co.* v. *Aschroft-Wilkins Co.*, 93 F.2d 233 (5th Cir. 1938); and *Northwestern Steam Boiler & Mfg. Co.* v. *Great Lakes Engineering Works*, 181 F. 38 (8th Cir. 1910).

Not only did due regard for the safety of Raymond's crew and its own crew impel Kiewit to take the measure it did, but, if Kiewit had not done so and there had been an ensuing accident as a result of the defective lifting hooks, liability for the resultant accident would have been fastened upon Kiewit alone (see Comment on Subsection (2) and Illustration of Subsection (2) to Section 336 of the Restatement of Contracts).

CONCLUSION

The judgment should be affirmed in all respects.

Dated: New York, New York
June 23, 1976

Respectfully submitted,

JAMES I. LYSAGHT
Attorney for Defendant-Appellant and Third-Party Plaintiff-Appellee
11 Park Place
New York, N. Y. 10007
962-3050

JOSEPH D. AHEARN
Of Counsel

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

United States Court of Appeals
For the Second Circuit

76-7097 76-7129

Raymond International Inc.
Plaintiff-Appellxxxxee
-against-
Peter Kiewit-Slattery (Joint Venture) sued herein as Peter Kiewit Sons' Company and Slattery Associates Inc., d/b/a Peter Kiewit Sons' Company, Slattery Associates Inc.,
Defendant-Appellant

Peter Kiewit-Slattery (Joint Venture) sued herein as Peter Kiewit Sons' Company and Slattery Associates Inc., d/b/a Peter Kiewit Sons' Company , Slattery Associates Inc.,
Third Party Plaintiff-Appellee
against
Bayshore Concrete Products Company
Third Party Defendant-Appellant

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Raymond J. Braddick, agent for James I. Lysaght Esq. being duly sworn, deposes and says that he is over the age of 21 years and resides at Levittown, New York

That on the 23rd. day of June , 1976 he served the annexed Brief on Behalf of Defendant and Third Party Plaintiff-Appellee upon

1. Symmers Fisch & Warner Esqs.
345 Park Avenue
New York, New York

2. Alexander Asch Schwarz & Cohen Esqs.
801 Second Avenue
New York, New York

in this action, by delivering to and leaving with said attorneys three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 23rd. day of June, 1976

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509708
Qualified in Delaware County
Commission Expires March 30, 19 77

Raymond J. Braddick